Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-539

CHRISTOPHER J. AQUILA, WILLIAM G. AYLWARD, CARL A. DODARO, JR., DIANNE F. DODARO, JOSEPHINE A. HOWELL, EILEEN PLUMMER and BRUNO VITLONE,

Petitioners

vs.

HAROLD E. BRICHFORD, RALPH PETTIFER, CECIL R. LUTZ, HUGH D. PALLISTER, DONALD M. PARK, WILLIAM G. RYAN, THE CITY OF WILLOUGHBY, A Municipal Corporation

Respondents

BRIEF FOR THE RESPONDENTS, Harold E. Brichford, Ralph Pettifer, Cecil R. Lutz, Hugh D. Pallister, Donald M. Park, William G. Ryan, and the City of Willoughby

---

Louis A. Turi, Jr.
Director of Law
City of Willoughby
Ohio
Attorney for these
Respondents,
4169 River St.
Willoughby, Ohio
Phone 216-951-2800

November 24, 1975

OTHER COUNSEL OF RECORD:

Ralph Rudd,
Rudd, Karl, Sheerer, Lybarger
and Campbell Co., L.P.A.
33 Public Square, Suite 210
Cleveland, Ohio 44113
216-241-3646
Attorneys for Petitioners

John G. Cardinal
500 Lake County National Bank Building
Painesville, Ohio 44077
216-352-3375
Attorney for the Defendant Respondent
T.E.K. & Associates

Nancy Buckley
Thomas D. Buckley, Jr.
132 Maple Street
Chagrin Falls, Ohio 44022
216-247-7533
Attorney and Counsel for the Amicus
Curiae the American Civil Liberties
Union of Greater Cleveland

INDEX

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

RESPONDENTS NOTE iii

CERTIFICATE OF SERVICE iv

(a) OPINIONS BELOW 1

(b) GROUNDS OF JURISDICTION 1

(c) CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES 1

(d) QUESTIONS PRESENTED FOR REVIEW 2

(e) STATEMENT OF THE CASE 2

(f) SUMMARY OF ARGUMENT 5

(g) ARGUMENT 6

CONCLUSION 14

APPENDIX I I

APPENDIX II II

TABLE OF AUTHORITIES

Cases	Page
46 Am. Jur. 2nd "Judgment" Section 28	11
Black's Law Dictionary, Fourth Edition	10
Brigido Urbino v. Porto Rico Ry Light & Power Co. 68 F. Supp. 841	13
Constitution of the United States Article III, Sect. 2	7
49 Corpus Juris Secundum Section 173	14
Ellis v. Dyson -US-, 44 L. Ed. 274, 95 S. Ct.	9
Revised Code of Ohio Section 731.28	8
Stiffel v. Thompson 415 US 45s 39 L. Ed 3d, 505, 94 S Ct. 1209	9
United States vs. Swift & Co. 286 US 106, 76 L. Ed. 999, 52 S Ct. 460	14
Worth vs. Seldin US 45 L. Ed 2d, 343, 95 S Ct.	6

RESPONDENTS' NOTE

In order to avoid some confusion, respondents have elected to follow petitioners use of references to the items in the appendix of the Circuit Court of Appeals by reference such as: "(A 66)".

Reference herein to any matter of the appendix of this brief are referred to as "(Resp. App. I or II.)

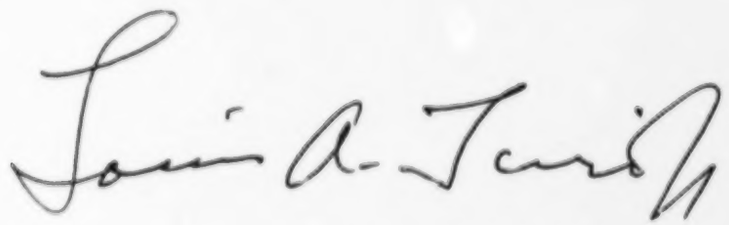
CERTIFICATE OF SERVICE

Three copies of the Brief for the Respondents, Harold E. Brichford, Ralph Pettifer, Cecil R. Lutz, Hugh D. Pallister, Donald M. Park, William G. Ryan and the City of Willoughby have been served this 26th day of November 1975 by United States Mail upon the attorney for each of the parties of records in the court below, that is:

Upon Ralph Rudd; Rudd, Karl, Sheerer, Lybarger and Campbell Co. L.P.A., 33 Public Square, Suite 210, Cleveland, Ohio 44113 phone 216,241-3646, attorney for Petitioners.

Upon John G. Cardinal, 500 Lake County National Bank Building, Painesville, Ohio 44077, phone 216,352-3375, attorney for the defendant respondent T.E.K. and associates;

And upon Nancy Buckley and Thomas D. Buckley, Jr., 132 Maple Street, Chagrin Falls, Ohio 44022, phone 216,247-7533, attorney and counsel for the amicus curiae the American Civil Liberties Union of Greater Cleveland.



Louis A. Turi, Jr.

(a)

OPINIONS BELOW

The opinions of the District Court were filed on November 21, 1973, and June 24, 1974. They were not published.

The opinion of the Court of Appeals was filed on June 6, 1975, and was not published.

All three opinions are found in the Petitioners Appendix, (29a) (40a) and (42a).

(b)

GROUNDS OF JURISDICTION

These respondents elect, under Rule 40(3), not to include comment on jurisdiction.

(c)

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

In addition to the provisions, statutes, etc., referred to in petitioners brief, these respondents contend that the following statute and constitutional provision are involved:

1. Ohio Revised Code Section 731.28
2. Article III, United States Constitution.

(d)

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Sixth Circuit err in affirming the order and findings of the District Court?

2. Do the petitioners have the right or standing as tax payers, citizens and residents of the City of Willoughby, Ohio, without alleging any injury sufficient to meet the "case or controversy" requirement within the meaning of Article III of the United States Constitution?

(e)

STATEMENT OF THE CASE

Petitioners filed an action in the Federal Court for the Northern District of Ohio, Eastern Division, on September 7, 1973, praying that certain action taken by the Council of the City of Willoughby, Ohio, in a matter involving local property zoning be set aside; that a judgment of the Court of Common Pleas of Lake County, Ohio, be bypassed or held for naught and praying further that the Council of the City be ordered, by way of a mandatory injunction, to pass "valid" zoning regulations on the affected private property.

The private property involved is a parcel of land in excess of 200 acres in Willoughby, approximately 100 acres of which was developed as a golf course, the remainder was entirely undeveloped. North of this property is a commercial airport, the zoning of which allows air fields and various companion light industrial and commercial uses. Westerly of the property is a public highway, highly traveled, westerly of which the land is zoned for limited industrial use. Southerly of this property is a development of single family homes on 60 foot lots. The easterly boundary of this property is the corporate line between the City of Willoughby and the City of Mentor, Ohio.

The property was, prior to September 20, 1972, zoned S-5, which allowed only one single family dwelling on a lot containing a minimum of five acres of land. This zoning classification was originally placed on the land at a time when there was no sanitary sewer service available in the area.

On September 20, 1972, the Council passed, and the Mayor signed, a rezoning ordinance allowing the owner, hereinafter referred to as T.E.K., to develop the property at a density of approximately 8 units per acre on the undeveloped land with a covenanted provision that the 100 acre golf course would stay intact for a minimum period of 20 years and allowing the City the right of first refusal to purchase in the event the developer should ever, during said period desire to sell the land.

These petitioners, as noted in the second paragraph on page 11 of their brief, attempted to defeat that rezoning and retain the status quo by circulating a referendum petition which the City found inadequate; petitioners, then brought the matter into the Common Pleas Court seeking to have the court order a referendum election or, in the alternative, to declare the ordinance void on a technicality. This, the court did and by virtue of petitioners own court action, the S-5 zoning remained in effect.

The Council of the City of Willoughby thereafter, elected to attempt to defend the S-5 zoning in an action which was filed against the City by the property owner T.E.K. on May 14, 1973. Petitioners took no part in this action and made no attempt to intervene therein.

The case came to trial on August 20, and 21, 1973 and was duly heard by the Court and went to judgment on August 22, 1973. (A-66)

Following the conclusion of the trial of this second State Court case, (T.E.K. vs. Willoughby) it was apparent to the City's legal counsel that the decision was going to be adverse to the City, and he advised the Council to authorize what was termed (perhaps not too accurately) a "Consent Decree". (A-46) The orders of the "Consent Decree" limited the use of the T.E.K. property in the same manner that the Council had attempted to limit it previously. The judgment in that case is found at A-66, Resp. App.

SUMMARY OF ARGUMENT

These respondents feeling at the time of this draft, that their argument may not exceed twenty pages, nevertheless, point out that the Circuit Court of Appeals did not err in affirming the District Court's Order herein; that the District Court's order was not in error. The complaint of petitioners alleged a conspiracy, and hence was able to survive the Motion to Dismiss.

The record, an agreed stipulation of matters of record, plus comments of Counsel, failed to show any evidence of the alleged conspiracy in violation of the Civil Rights Acts. The petitioners have made no allegation or claim that they have been damaged herein other than what may have been suffered or sustained by the general public of the City of Willoughby. Therefore, they have no right or standing to bring this action.

No pendent jurisdiction as to state issues was exercised by the District Court, rather, (A-74, the last sentence of the first paragraph) that Court specifically abstained from assuming jurisdiction of what appeared to be a state issue.

The Circuit Court of Appeals in affirming the District Court, adding the comment as to state issues, (Petitioners' Appendix 44a) did not "---Remit---" as claimed by petitioners in their Question 5 page 4, Petitioners brief.

The action of the City of Willoughby in attempting to defend the S-5 zoning, which resulted from the action of the petitioners themselves, and the City's termination of the State Court attack thereon was no violation of petitioners' rights under any Civil Rights Statutes.

(g)

ARGUMENT

Did the District Court err in holding that the actions of the City did not violate any of the petitioners civil rights?

At the outset, we propose that if there were any error on the part of the District Court, then it was when the District Court failed to grant these respondents' original motion to dismiss — unfortunately, we did not argue or brief the question of lack of standing in the Courts below, hence, the District Court, through our error, did not consider this question of standing. We did not then have the benefit of **Worth v. Seldin,** -US- 45 L. Ed 2nd 343, 95 S Ct — decided June 25, 1975. The Lawyer's Edition Headnotes at Page 345

> "4. When the harm asserted by plaintiff is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of federal jurisdiction."

> "5. Even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement of Article III of the Federal Constitution, he generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

> "9. To show standing, the plaintiff must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."

We quote further from the opinion page 355 of the Lawyers Edition:

> "(4,5) Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.---"

> "6,7a,8a, 9, 10) ---Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art III's requirements remains; the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. E.g., United States v. SCRAP, 412 US 669, 37 L Ed 2d 254, 93 S Ct 2405 (1973). ---"

Petitioners have contended in the District Court, the Court of Appeals and now in this Court, that the Council of Willoughby violated their Civil Rights in not changing the zoning of the T.E.K. property before the trial of T.E.K. in the State Court.

Petitioners were responsible for the 5 acre zoning remaining on the property through their own action in State Court. They litigated and defeated Council's decision to change the zoning. Now, when Council elected to defend petitioners' desired status quo, and became aware it was a losing battle, the Petitioners for the first time, in their District Court Complaint, Paragraph No. 10, admit the 5 acre minimum zoning to be invalid -A-8 Stipulations A-24, A-25. By what rule of logical fairness or law can they now complain that Council's failure to have corrected petitioners' S-5 zoning violates their (petitioners) Civil Rights?

Petitioners attempt to disguise the claimed generalized grievance as an excuse to invoke relief under Federal Statutes and this judicially should not be allowed. The gates of the Federal Courts would be open to torrents of attempts to settle purely local issues. This, certainly, is not the stated function of Civil Rights Statutes in Chapter 42, USC, nor did the Congress ever intend it so. Petitioners, had they felt the public interest was not being served by the invalid zoning, could have taken action by way of Initiative Petition under Ohio Revised Code Section 731.28 (Resp. App. II) or, they could have sought intervention in the State Case, **T.E.K. v. Willoughby**. They did neither.

Ordinarily, in a case involving a violation of a person's Civil Rights, the rule that state judicial or other remedies must first be exhausted is not applicable. **Steffel v. Thompson** 415 US 452, 39 L Ed 2d 505, 94 S Ct. 1209 (1974).

This Court, however, in **Ellis v. Dyson** US , 44 L Ed 274, 95 S Ct , while affirming the general rule on exhaustion of remedies added, at page 281 of the Opinion in the Lawyers Edition,

> " --- We did require, however, that it be clearly demonstrated that there was a continuing, actual controversy as is mandated both by the Declaratory Judgment Act. 28 USC Sec. 2201 (28 USCS Sec. 2201), and by Article III of the Constitution itself.---"

Respondents contend that what this means, and it is equitable and in the spirit of the law, that if there is no standing, then the petitioner should or should have, exhausted his state remedies.

Finally, in defense of the correctness of the holdings of both the Sixth Circuit Court of Appeals and of the District Court we wish to point out that the Questions of Law 3, 4 and 5 presented by Petitioners are synthetic and semantically contrived so as to provide a basis for the pages of legal argument following. That argument has no real relationship to the actual issues herein.

In order to evaluate the correctness of the orders and opinions below, it is necessary to read the actual orders and opinions in relation to the Complaint; and further, to observe the record or perhaps we should say the lack of record, in that no evidence was attempted to be introduced by Petitioners to support claims of conspiracy or violations of Civil Rights.

THE "CONSENT JUDGMENT"

We fail to understand the Petitioners' objections to the findings of the State Court in T.E.K. v. Willoughby, (A-66, Trial Court Joint Exhibit 7) in view of the fact that the legal findings therein concur with the Respondents own appraisal of the invalidity of S-5 zoning (A-8, A-24, A-25).

The Judgment shows that the cause was "---duly heard---" (A-66.

"Duly" is defined in **Black's Law Dictionary** Fourth Edition Page 591 as:

> "DULY, in due or proper form or manner; according to legal requirements.
>
> Regularly; properly, suitable; upon a proper foundation, as distinguished from mere form; according to law in both form and substance."

We point out that the State Court proceeded to make its findings of fact and declarations, determinations or conclusions of the law, not until then did the Court include the "Consent" portion of the entry, to-wit: The conditions and terms **limiting** the use of the property which the Court had found as a matter of law to be unlimited.

The District Court noted these limitations on the property and the public interest to be served thereby in its opinion, Page 8 where the Court stated at (A-79)

> "---Council might well have been faced with a situation in which the property was unzoned and in which there would be no control on the development thereon---"
>
> (We reiterate Petitioners **own** action had placed Council in this position.)

Judgments are presumed to be valid. **46 Am Jur. 2d, Judgments Part C, Presumptions in general, Section 28,** starting at page 332, we find the following:

> "A judgment is not, under general rules, applicable to the subject, presumed to be erroneous, but, to the contrary, is presumed to be valid until vacated by some proper proceeding instituted directly for the purpose of correcting errors therein, where the judgment is within the jurisdiction of the Court rendering it. Under such circumstances the judgment so rendered raises a presumption that the Court acted impartially, honestly, justly, after due consideration, correctly, in conformity to law, and in accordance with its duty. This presumption of the validity of a judgment extends to all matters in the various stages of the proceeding, from its initiation to its completion. It is presumed, in support of the judgment, that the proceedings were regular, in conformity with settled usage, and sufficient to support the judgment, and that every requisite, and every fact necessary to sustain the judgment, were present.

> These rules are particularly applicable to a judgment rendered after a trial upon the merits, as to which every reasonable doubt will be resolved in favor of the judgment. It has been declared that the integrity and value of the judicial system as an institution for the administration of justice rest largely upon these principles. However, a presumption in favor of the validity of a judgment will not be indulged where it is in violation of an express statutory requirement."

We wish to point out further, that as to both consent judgments and judgments generally, the burden of upsetting the same is on the attacker. We certainly accept and acknowledge the fact that if a decree of the Court has been the result of any fraud or collusion, then, certainly, it would be open to question and should be vacated.

In the instant case, however, Petitioners want it vacated and set aside merely on their suspicion of conspiracy, fraud and collusion. Unfortunately, they have offered no evidence in this direction nor have they taken advantage of their opportunity for ascertaining whether any such elements were present. The presumption of validity of the judgment and findings are real and must be acknowledged in the absence of any evidence to the contrary.

An unfortunate fact is the styling "consent judgment" given by all parties in this case to the entire entry in the State Court action. This was wrong. The facts under the law indicate that it was a valid adverse judgment.

A judgment is separate and distinct from the findings and conclusions of law of a Court although very often, as in the instant case, findings of the Court are incorporated in the same instrument as the judgment. In the State Case the record shows that the case was tried to the Court, the findings of fact, conclusions and the judgment that followed were after completion of the trial. There is no question that the Court had jurisdiction of the parties and the subject matter, heard evidence and the exhibit speaks for itself starting at A-66. This judgment was a **joint exhibit of the parties.** Petitioners have not sought to contravert any of the findings and conclusions therein. Even though the judgment has been styled a "consent judgment" it, in fact, as to the findings and conclusions, is not. A judgment by consent, while distinct from a judgment rendered by a Court after a hearing and consideration of the evidence in a case, nevertheless, in the absence of fraud or collusion, is given all the honor and presumptions given any other judgment. **Brigida Urbino vs. Porto Rico Ry. Light & Power Co.** 68 F Supp. 841.

> "Syllabus 1.
> In absence of fraud, consent judgment entered by court of competent jurisdiction over subject matter and parties is conclusive on parties to same extent as judgment rendered on controverted facts and after contested trial, and hence operates as res judicata between same parties in second action involving same cause of action.
>
> Syllabus 2.
> A "consent judgment" is not a mere authentication or recording of an agreement between parties, but is judicial act involving exercise of judicial power."

A judgment does not become a judgment by consent even though the parties have added their consent to the adjudication of the Court. **49 CJS Judgment Sy 173 Page 309.**

In the judgment of the State Court, the Court does not commence to note the agreed matters until after noting findings (A7)) stating:

> "---Further,--- the Court adopted as its continuing order the agreement of the parties as hereinafter set forth---".

The United States Supreme Court has spoken with regard to consent judgment, generally, and the consent judgment is an often utilized type of entry in the Federal Court System, see **United States vs. Swift and Company,** 286 U.S. 106, 76 L. Ed. 999, 52 S. Ct. 460. In Swift the Court held that consent decrees are not to be regarded as mere agreements but as adverse judgments.

Do the petitioners have the right or standing as taxpayers, citizens and residents of the City of Willoughby, Ohio, without alleging any injury sufficient to meet the "case or controversy" requirement within the meaning of Article III of the United States Constitution?

Respondents answer is NO. We refer the Court to our previous discussion on this question, further argument would only be redundant.

CONCLUSION

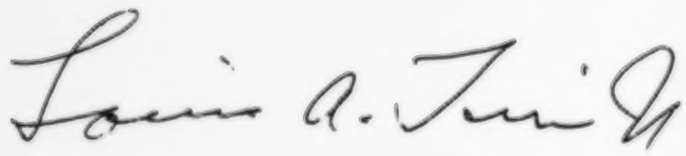
In Conclusion, Respondents submit:

A. They request the Court to examine the opinions below and to analyze the Petitioners self-serving characterizations such as "Rezoned by Consent Decree".

B. They request the Court to affirm the Courts below, and to deny the Writ requested by petitioners.

C. They request the Court to honor the validity of the judgment of the State Court which validity was recognized by the Courts below, by affirming the decisions of said Courts.

Respectfully submitted,



Louis A. Turi, Jr.
Director of Law
City of Willoughby, Ohio
Attorney for these
Respondents.
4169 River St.
Willoughby, Ohio
216-951-2800

CONSTITUTION OF THE UNITED STATES

ARTICLE III

[JUDICIAL DEPARTMENT]

§1 The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminshed during their Continuance in Office.

§2 The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;---to all Cases affecting Ambassadors, other public Ministers and Consuls;---to all Cases of admiralty and maritime Jurisdiction;---to Controversies to which the United States shall be a Party;---to Controversies between two or more States;---† between a State and Citizens of another State;---between Citizens of different States;---between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

REVISED CODE OF OHIO

SECTION 731.28

[INITIATIVE AND REFERENDUM[

§731.28 Ordinances and measures proposed by initiative petition.

Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the next preceding general election for the office of governor in the municipal corporation.

When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, certify the text of the proposed ordinance or measure to the board of elections. The auditor or clerk shall retain the petition.

The board shall submit such proposed ordinance or measure for the approval or rejection of the electors of the municipal corporation at the next succeeding general election, occurring subsequent to ninety days after the certifying of such initiative petition to the board of elections. No ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the measure in such municipal corporation shall be subject to the veto of the mayor.

HISTORY: GC § 4227-1; 102 v 521, § 1; 103 v 211; 104 v 238; 125 v 713 (730); 126 v 205(208). Eff 1-1-56. The act, of which GC §§4227-1 to 4227-5 were a part, was declared by the legislature to be an emergency measure, 103 v 211 (213), §3.